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No. 453

In the Supreme Court of the United States

October Term, 1938

United States Trust Company of New York, as Executor u/w of George H. Bunker, Deceased, petitioner

v.

Guy T. Helvering, Commissioner of Internal Revenue

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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OPINIONS BELOW

The memorandum opinion of the Board of Tax Appeals (R. 7–9) is unreported. The opinion of the Circuit Court of Appeals (R. 15–17) is reported in 98 F. (2d) 734.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered August 10, 1938 (R. 18). The petition for a writ of certiorari was filed October 31,

1938 (R. 19), and was granted December 5, 1938 (R. 19). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether statutes which exempt War Risk Insurance from taxation prevent the inclusion of the proceeds of such policies in the gross estate for estate-tax purposes under Section 302 (g) of the Revenue Act of 1926.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are found in the Appendix, *infra,* pp. 33–41.

STATEMENT

The facts as stipulated (R. 12–13) and as found by the Board of Tax Appeals (R. 7–9) are substantially as follows:

The decedent, George H. Bunker, died on December 10, 1934 (R. 12).

At the time of his death he held a life insurance policy issued under and subject to the provisions of the War Risk Insurance Act and amendments and supplements thereto. The designated beneficiary was the decedent's wife (R. 13).[1]

The Commissioner of Internal Revenue included in the decedent's gross estate for estate tax purposes the proceeds of this insurance, amounting to

[1] According to the petition (R. 2) the policy was a converted War Risk Insurance Policy, No. K649770.

$10,000. By reason of the inclusion of those proceeds in the gross estate the total life insurance of the decedent exceeded the statutory exemption of $40,000 by $6,942.87, and a deficiency in tax in the amount of $944.31 was asserted (R. 13).

The Board of Tax Appeals held that the proceeds of the policy in question were properly included in the gross estate and sustained the Commissioner's determination of the deficiency in issue. Upon appeal the Circuit Court of Appeals affirmed the Board's decision (R. 18).

SUMMARY OF ARGUMENT

The sole question involved in this case is whether there is required to be included in the decedent's gross estate the sum of $10,000 representing the proceeds of a War Risk Insurance policy taken out by the decedent and made payable to his wife. The question arises only by virtue of the fact that when that sum is added to the proceeds of other policies payable to specific beneficiaries, the total exceeds the statutory exemption of $40,000 granted by Section 302 (g) of the Revenue Act of 1926.

It is clear that Congress has attempted to require the inclusion of the proceeds of such policies in the gross estate, for Section 302 (g) in terms applies to all forms of insurance. Prior statutes have contained similar provisions, and the regulations of the Treasury Department, while containing no specific reference to such policies, have consistently construed Section 302 (g) and the corresponding

provisions of previous statutes as including all forms of life insurance without exception. The re-enactment of the statute without substantial change is persuasive evidence of the legislative approval of the administrative construction.

The petitioner does not contend otherwise, but claims that the proceeds are exempt by virtue of Section 22 of the World War Veterans' Act, 1924, which provides that insurance payable under that Act shall be exempt from all taxation. It is questionable whether that statute or Section 3 of the Act of August 12, 1935, which provides that payments of benefits due or to become due shall be exempt from taxation, is the controlling statute. But it is not believed the change in language affects this case. As applied to insurance, both statutes mean that no tax shall be imposed on the proceeds of the policy.

The Government concedes that a direct tax on the proceeds or the policy is prohibited by this legislation. The questions to be decided are whether the Federal estate tax here involved is a direct tax; and if not, whether it is nevertheless prohibited by the exemption legislation.

It is well settled that the Federal estate tax is not a direct tax but an excise tax imposed upon the transfer of the net estate upon the death of the decedent. Hence the inclusion of the value of any specific property in the gross estate does not mean that the property itself is taxed but merely that its

value becomes a part of the measure of the tax upon the transfer. Moreover, this Court has specifically held that to include the proceeds of an insurance policy payable to designated beneficiaries in the gross estate is not to impose a tax on the policy or the proceeds, provided that there is a shifting of economic benefits at death which justifies the imposition of a transfer tax. The petitioner does not argue that there was not a shifting of economic benefits at the death of the decedent sufficient to justify the imposition of a transfer tax. Hence it is clear that the tax involved in this case is not a tax on the proceeds or the policy.

This court has hitherto held that statutes prohibiting the taxation of property or contracts do not bar the subsequent imposition of Federal or State transfer taxes measured in part by the value of such property or contracts. Those decisions are controlling here.

The petitioner relies upon certain decisions of State courts holding that the proceeds of War Risk Insurance policies are not subject to State inheritance or succession taxes. We submit that those cases are not controlling, both because the State statutes there involved contained no express provision requiring the proceeds of any insurance policies payable to specific beneficiaries to be included in the measure of the tax and because the concept of a transfer implicit in the laws of those States differed from that developed under the Fed-

eral estate tax law. The decisions referred to stressed the fact that the proceeds passed to the recipient under the contract, and not by will or under intestacy laws, and those courts did not have occasion to decide whether, if there had been a specific provision requiring the proceeds to be included in the gross estate, the exempting legislation would have prohibited the tax.

The petitioner also relies upon Section 315 (a) (Appendix, *infra*, p. 33) making the estate tax a lien for ten years on the gross estate; upon Section 315 (b), *infra*, placing a lien upon insurance payable to a specific beneficiary and making the beneficiary liable for the tax, if it is not otherwise paid; and upon Section 314 (b), *infra*, enabling the executors after payment of estate taxes to secure reimbursement of a proportionate amount of the tax from the beneficiary. It is suggested that by virtue of these provisions the proceeds of the policy received by the beneficiary of a War Risk Insurance policy will be diminished and that Congress did not intend this result. But it cannot be taken for granted that the proceeds will bear a part of the tax. And even if they do, it cannot be assumed that Congress did not intend the proceeds to be diminished in this way, in view of the large exemptions granted in the Federal estate tax laws themselves. There is nothing in the War Risk Insurance legislation or in its legislative history which supports the petitioner's suggestion. Con-

gress merely expressed its purpose to exempt the proceeds from taxation, and the tax here involved is not a tax on the proceeds. Exemptions from taxation are to be strictly construed and cannot be enlarged by implication.

No constitutional question is presented in this case. The question is whether the tax here involved is prohibited by the statute, and not whether the United States may repudiate its obligation under the contract with the veteran.

ARGUMENT

THE AMOUNT PAID TO THE BENEFICIARY OF THE WAR RISK INSURANCE POLICY TAKEN OUT BY THE DECEDENT ON HIS LIFE IS REQUIRED TO BE INCLUDED IN HIS GROSS ESTATE FOR FEDERAL ESTATE-TAX PURPOSES

The sole question involved in this case is whether there is required to be included in the decedent's gross estate the sum of $10,000 representing the proceeds of a War Risk Insurance policy taken out by the decedent and made payable to his wife. The question arises only by virtue of the fact that when that sum is added to the proceeds of other policies payable to designated beneficiaries the total exceeds the statutory exemption of $40,000 granted by Section 302 (g) of the Revenue Act of 1926 (Appendix, *infra*, p. 32.[2] The court below held, as did the

[2] Even then no estate tax would have been imposed under the Revenue Act of 1926 had the net estate not exceeded $50,000. See Section 301 (a) (U. S. C., Title 26, Sec. 410). But additional estate taxes imposed under Section 401 of

Board of Tax Appeals, that the proceeds of the policy were required to be included in the gross estate under Section 302 (g). See also *Bankers Trust Co.* v. *Commissioner,* 33 B. T. A. 746.

As the court below stated, it is plain enough that Congress has attempted to require the inclusion of the proceeds of such policies in the gross estate, for Section 302 (g), *infra,* in terms, applies to all forms of insurance. That section provides that the value of the decedent's gross estate shall include insurance proceeds—

> To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life.

Prior statutes have contained similar provisions. See Section 402 (f) of the Revenue Acts of 1918 (c. 18, 40 Stat. 1057, 1098) and 1921 (c. 136, 42 Stat. 227, 229), and Section 302 (g) of the Revenue Act of 1924 (c. 234, 43 Stat. 253, 305). The regulations of the Treasury Department have never contained a specific reference to War Risk Insurance policies,

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the Revenue Act of 1932, c. 209, 47 Stat. 169, as amended by Section 405 of the Revenue Act of 1934, c. 277, 48 Stat. 680 (U. S. C., Title 26, Sec. 535) reached net estates in excess of $10,000. In this case the gross estate was $348,372.88 (R. 5), of which only $6,942.87 represented insurance in excess of $40,000 (R. 5).

but they have consistently construed Section 302 (g) of the statute here involved and the corresponding provisions of previous statutes as including all forms of life insurance without exception, and the reenactment of the statute without substantial change is persuasive evidence of legislative approval of the administrative construction (*Morrissey* v. *Helvering,* 296 U. S. 344; *Mass. Mutual Life Ins. Co.* v. *United States,* 288 U. S. 269; *McCaughn* v. *Hershey Chocolate Co.,* 283 U. S. 488; *Hassett* v. *Welch,* 303 U. S. 303).[3]

The petitioner does not in fact argue that the language of Section 302 (g) excludes the proceeds of War Risk Insurance policies. Its argument is that the proceeds are exempt under Section 22 of the World War Veterans' Act of June 7, 1924 (Appendix, *infra,* p. 35), which provides in part—

> That the compensation, insurance, and maintenance and support allowance payable under Titles II, III, and IV, respectively * * * shall be exempt from all taxation: * * *

[3] The regulations here involved are Articles 25 and 27 of Regulations 80 (Appendix, *infra,* pp. 39–40). For regulations under prior Acts, see Articles 27 and 29 of Regulations 63 (1922 Ed.); Articles 25 and 27 of Regulations 68 (1924 Ed.); and Articles 25 and 27 of Regulations 70 (1926 Ed.), Appendix, *infra,* p. 37. See, also, Articles 32 and 34 of Regulations 37 (1921 Ed.). Some of these regulations were amended by Treasury Decisions but not in any way that affects this controversy. See T. D. 3945, V–2 Cumulative Bulletin 228; T. D. 4242, VII–2 Cumulative Bulletin 354.

We think it is questionable whether that statute is the controlling statute. War Risk Insurance was first provided for by Sections 400 to 405 of Article IV of the Act of October 6, 1917, c. 105, 40 Stat. 398, 409–411, hereinafter called the War Risk Insurance Act. That Act contained no provision exempting the proceeds of policies from taxation.[4] But Section 2 of the Act of June 25, 1918 (Appendix, *infra*, p. 34), adding Section 28 to the War Risk Insurance Act, provided that insurance payable under Article IV should be exempt from all taxation. This Act was repealed by Section 601 of the World War Veterans' Act, 1924 (c. 320, 43 Stat. 607, 629) which, in Section 22 (Appendix, *infra*, p. 35) contained a new provision to the same effect. The latter section was in turn repealed by Section 3 of the Act of August 12, 1935 (Appendix, *infra*, p. 36). But the same section, which was made retroactive by Section 5, *infra*, provided that—

> Payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of, a beneficiary under any of the laws relating to veterans shall be exempt from taxation, * * *.

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[4] Compare Section 311, which provided that compensation payable under Article III should not be assignable and should be exempt from all taxation, with Section 402, which provided merely that insurance should not be assignable and should not be subject to the claims of creditors.

The decedent in this case died December 10, 1934 (R. 12), while Section 22 of the World War Veterans' Act, *infra*, was in effect. But since that statute was subsequently repealed and Section 3 of the Act of August 12, 1935, *infra*, was made applicable to payments already made, it is conceivable that the latter statute controls. It is not believed, however, that the slight change in language affects the case in any way. Under the first statute it is provided that the "insurance" shall be exempt from "all taxation," and under the second that "Payments of benefits * * * made to, or on account of, a beneficiary * * * shall be exempt from taxation * * *." In *Lawrence* v. *Shaw*, 300 U. S. 245, 249, this Court stated that the second statute was intended to clarify the former rather than to change its purpose. As applied to insurance both clearly mean that no tax shall be imposed on the proceeds.

The Government concedes that a direct tax on the proceeds or the policy is barred by this legislation. Hence the questions to be decided are whether the Federal estate tax here involved is a direct tax on the proceeds or the policy, and if it is not, whether it is nevertheless prohibited by the exempting legislation.

1. The character of the Federal estate tax is well settled. It is an excise tax and not a direct tax. *Greiner* v. *Lewellyn*, 258 U. S. 384; *United States* v. *Woodward*, 256 U. S. 632; *New York Trust Co.*

v. *Eisner*, 256 U. S. 345; *Chase Nat. Bank* v. *United States*, 278 U. S. 327. The tax is imposed upon the transfer of the net estate upon the death of the decedent. *Edwards* v. *Slocum*, 264 U. S. 61; *Y. M. C. A.* v. *Davis*, 264 U. S. 47; *Nichols* v. *Coolidge*, 274 U. S. 531. Hence the inclusion of the value of any specific property in the gross estate does not mean that that property is itself taxed, but merely that its value becomes a part of the measure of the tax upon the transfer. *Chase Nat. Bank* v. *United States*, *supra*. See also *Keeney* v. *New York*, 222 U. S. 525. That is merely a step in the calculation. *Porter* v. *Commissioner*, 288 U. S. 436. It is upon that theory that this Court has sustained the inclusion in the measure of the tax of what reasonably may be regarded as substitutes for testamentary transfers, even though there is no transfer of title at death. *Helvering* v. *City Bank Co.*, 296 U. S. 85; *Porter* v. *Commissioner*, *supra*; *Milliken* v. *United States*, 283 U. S. 15.

Not only has this Court held generally that the estate tax is not a direct tax imposed upon the items that comprise the gross estate, but it has held specifically that to include the proceeds of an insurance policy payable to designated beneficiaries in the gross estate is not to impose a tax on the policy or on the proceeds, because there is a shifting of economic benefits at death which justifies the imposition of a transfer tax. *Chase Nat.*

Bank v. *United States, supra*. We submit that that decision is controlling authority as to the nature of the tax imposed here, and hence that the tax is not a tax on the policy or on the proceeds. There is no material difference in the statutes involved in the two cases. Compare Section 402 (f) of the Revenue Act of 1921, *supra*, with Section 302 (g) of the Revenue Act of 1926 (Appendix, *infra*, p. 32). The petitioner does not argue that there was not a shifting of economic benefits at the death of the decedent sufficient to justify the imposition of a transfer tax, and it points to no differences between the commercial insurance contract involved in the *Chase Nat. Bank* case and the War Risk Insurance policy involved in this case which would make that decision inapplicable. The petitioner does suggest that the War Risk Insurance has some of the elements of a bounty and some of a contract (citing *Cassarello* v. *United States*, 279 Fed. 396 (C. C. A. 3d)). But it is a bounty only in the sense that the Government has charged insufficient premiums to take care of the cost. This Court has held that it is a contract, though not one entered into for profit by the Government. *United States* v. *Worley*, 281 U. S. 339; *White* v. *United States*, 270 U. S. 175; *Lynch* v. *United States*, 292 U. S. 571. In so far as the insured is concerned, there is no distinction. He purchased the insurance and was obliged to pay premiums to keep it in force (*Smith* v. *United States*, 292 U. S. 337), though he secured it at a bar-

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gain price. Upon his death there was a transfer of property procured through expenditures by him with the purpose, effected at his death, of having it pass to another. *Chase Nat. Bank* v. *United States, supra,* Cf. *Lang* v. *Commissioner,* 304 U. S. 264.

If, therefore, the tax in this case is prohibited, it must be upon the theory that the exemption provisions of the War Risk legislation prohibit not only a direct tax on the proceeds, but also an indirect tax on the transfer of the net estate of the decedent measured in part by the proceeds of War Risk Insurance policies.

2. This Court has hitherto held that statutes prohibiting the taxation of property or contracts do not bar the imposition of transfer taxes measured in part by the value of such property or contracts. Thus, in *Plummer* v. *Coler,* 178 U. S. 115, there was involved a statute authorizing the issuance of Federal bonds which provided that "all of which said several classes of bonds and the interest thereon shall be exempt from the payment of all taxes or duties of the United States, as well as from taxation in any form by or under state, municipal or local authority" (p. 116). It was nevertheless held that the bonds were subject to a New York inheritance tax, which was a tax on the privilege of acquiring property by inheritance. To the same effect is *Orr* v. *Gilman,* 183 U. S. 278. Similarly, in *Murdock* v. *Ward,* 178 U. S. 139, Federal bonds were held to be subject to Federal inheritance tax, not-

withstanding a provision in the statute stating that the bonds should be exempt from all taxation. See also *Sherman* v. *United States*, 178 U. S. 150.

In *Igleheart* v. *Commissioner*, 77 F. (2d) 704 (C. C. A. 5th), the court held that Federal Farm Loan bonds might be included in the decedent's gross estate under Section 302 (a) of the Revenue Act of 1926, notwithstanding the fact that the statute provided that the bonds should be exempt from Federal, state, municipal, and local taxation. The court there said (p. 712):

> The estate tax is not a tax on property. It is an excise on the privilege of transmitting property of a decedent upon his death; the amount of the tax being measured by the value of the property transmitted. *Chase National Bank* v. *United States*, 278 U. S. 327, 49 S. Ct. 126, 73 L. Ed. 405, 63 A. L. R. 388; *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 41 S. Ct. 506, 65 L. Ed. 963, 16 A. L. R. 660; *Knowlton* v. *Moore*, 178 U. S. 41, 20 S. Ct. 747, 44 L. Ed. 969. The provision exempting from taxation Federal Farm Loan bonds and the income therefrom is not violated by measuring the estate tax by the value, at the time of the decedent's death, of all of his property, including such bonds, as the United States may tax the transmission of property upon the death of its former owner, regardless of the character of that property. *Plummer* v. *Coler*, 178 U. S. 115, 20 S. Ct. 829, 44 L. Ed. 998; *Murdock* v.

Ward, 178 U. S. 139, 20 S. Ct. 775, 44 L. Ed. 1009; *Greiner* v. *Lewellyn,* 258 U. S. 384, 387, 42 S. Ct. 324, 66 L. Ed. 676.

Upon a like principle it has been held that Liberty Bonds may be included in the measure of the Federal gift tax, which is a tax on transfers and not on property (*Bromley* v. *McCaughn,* 280 U. S. 124), even though the statute exempted the bonds from all taxes except estate and inheritance taxes. *Hamersley* v. *United States,* 16 F. Supp. 768 (C. Cls.), certiorari denied, 300 U. S. 659; *Phipps* v. *Commissioner,* 91 F. (2d) 627 (C. C. A. 10th), certiorari denied, 302 U. S. 742. Income taxes may be imposed on the profit from the sale of such bonds (*Central Hanover Bank & Trust Co.* v. *United States,* 14 F. Supp. 541 (C. Cls.)), and upon salary or dividends paid in such bonds (*Hitner* v. *Lederer,* 14 F. (2d) 991, 55 F. (2d) 343 (E. D. Pa.), affirmed, 63 F. (2d) 877 (C. C. A. 3d); *James* v. *Commissioner,* 13 B. T. A. 764, affirmed on other issues, 49 F. (2d) 707 (C. C. A. 2d)).

Similarly, where constitutional immunity of the obligations or property of a State or the Federal Government from taxation by the other government has been urged in opposition to death duties, this Court has held that the tax was not objectionable, because it was a tax not on those obligations or on that property but on the transfer. *Greiner* v. *Lewellyn, supra; Plummer* v. *Coler, supra; Snyder* v. *Bettman,* 190 U. S. 249; *United States*

v. *Perkins,* 163 U. S. 625. See also *Willcuts* v. *Bunn,* 282 U. S. 216.

Furthermore, the proceeds of War Risk Insurance were exempted "from taxation" (Sec. 3 of the Act of August 12, 1935) or "from all taxation" (Sec. 22 of the World War Veterans' Act, 1924) only in general terms even after similar general language in prior Federal statutes, exempting United States bonds from all Federal and State taxes, had been construed by this Court not to prohibit Federal and State inheritance taxes measured in part by the exempt bonds. *Plummer* v. *Coler,* 178 U. S. 115; *Murdock* v. *Ward,* 178 U. S. 139. The settled rule of construction applies that in "adopting the language used in an earlier act, Congress must be considered to have adopted also the construction given by this Court to such language, and made it a part of the enactment." *Hecht* v. *Malley,* 265 U. S. 144, 153; *Latimer* v. *United States,* 223 U. S. 501, 504; *Sessions* v. *Romadka,* 145 U. S. 29, 42.

3. The petitioner relies upon certain decisions of State courts holding that the proceeds of War Risk Insurance policies are not subject to State inheritance or succession taxes. We submit that those cases are distinguishable, both because the statutes there involved contained no express provision requiring the proceeds of any insurance policies payable to specific beneficiaries to be included in the measure of the tax and because the concept of a

transfer implicit in the laws of those States differed from that developed under the Federal estate tax law.

An examination of the decisions in question shows that the State courts approached the problem of determining whether the proceeds of War Risk Insurance policies could be included in the measure of the State inheritance or succession taxes by seeking to determine whether or not the proceeds passed under the State laws of descent and distribution. Apparently the tax officials did not argue that even though the proceeds did not pass under such laws, there was nevertheless a transfer within the meaning of the State inheritance tax laws, and, as is hereinafter pointed out, the provisions of their taxing statutes precluded such an argument. Most of the cases involved a situation where the designated beneficiary had predeceased the veteran, and under the applicable Federal law the proceeds became payable to the estate, to be distributed under State laws of descent and distribution. It was argued that in view of the latter provision the proceeds passed under State laws and not under the contract, and hence that they were subject to the tax. But the courts rejected that argument, holding that the Federal statute providing that the proceeds should be so distributed was merely a part of the contract and that the insurance passed under the contract. *Tax Comm.* v. *Rife*, 119 Ohio St. 83; *Watkins* v. *Hall*, 107 W. Va. 202; *In re Estate of Harris*, 179 Minn. 450; *Wanzel's Estate*, 295 Pa.

419; *In re Cross' Estate,* 152 Wash. 459. It should be noted that the courts there construed the Federal statute as meaning that upon the death of the designated beneficiary the proceeds passed to the estate to be distributed to the permitted class of beneficiaries who were entitled to take the decedent's personal property. Cf. *Singleton* v. *Cheek,* 284 U. S. 493. *Succession of Geier,* 155 La. 167, was similar, except that the Federal statute applicable to the insurance there involved specifically provided that where the designated beneficiary died the insurance should be paid directly to those of the permitted class of beneficiaries who would take the decedent's personal property under the State law. See 55 A. L. R. (Ann.) 613; 63 A. L. R. (Ann.) 394.

It is true that in some of those cases the courts have held that it was the intention of Congress to exempt the insurance payments from inheritance taxes as well as property taxes, but they have not reached that conclusion by an independent examination of the exemption provision of the Federal statute. In each instance the court has stressed the fact that the proceeds were paid under contract to the beneficiary and did not pass by will or under the intestacy laws. Most of the decisions have distinguished *Plummer* v. *Coler, supra,* and *Murdock* v. *Ward, supra,* on the ground that in those cases the bonds became a part of the succession. *In re Estate of Harris, supra; Tax Comm.* v. *Rife, supra;*

Wanzel's Estate, supra. For instance, in *Succession of Geier, supra;* the court said (pp. 169–170):

> The terms of the act are clear and unambiguous. Summarizing its provisions, there is a positive prohibition against all taxation on money paid out by the federal government under section 28, arts. 2, 3, and 4; and the insurance provision thereof is a contract between the United States, its agents, and the persons designated in the act as the beneficiaries of deceased service men. It is a bar to all state legislation which is in conflict with it.
>
> Our attention has been called to the cases which hold that a state may impose an inheritance tax on the obligations and securities of the United States which form part of a succession. In those cases the property fell into the succession, no question of the violation of a contract was raised, and the decisions were based upon the finding that the tax was a tax upon the right to inherit and not a tax upon the property. In this case a contract is involved, and the tax sought to be enforced is a tax upon money paid out by the government under the provisions of the War Risk Insurance Act to the beneficiaries of a deceased service man. It may therefore be said that the jurisprudence established by the cases referred to can have no application to this case.
>
> For these reasons we are of the opinion that the beneficiaries of deceased service men, who receive insurance money under the

> provisions of the War Risk Insurance Act, do not take as heirs. They come within the permitted class of beneficiaries, because they are the heirs at law or next of kin of the deceased service man, but they are designated in the act as beneficiaries, and they take as such under the contract of insurance to the same extent and in the same manner as the beneficiary named in the policy of insurance would take in the event such beneficiary survived the insured.

In *Tax Comm.* v. *Rife, supra,* the court said (pp. 91–92):

> Much stress is placed by counsel for plaintiff in error upon the cases of *Plummer, Exr.,* v. *Coler, Compt.,* 178 U. S. 115, 20 S. Ct. 829, 44 L. Ed. 998, and *Murdock, Exr.,* v. *Ward,* 178 U. S. 139, 20 S. Ct. 775, 44 L. Ed. 1009, in which it is held that bonds of the United States, the property of a decedent, are subject to the state inheritance tax. Of course, such obligations reciting the ordinary relation of debtor and creditor between the government and the holder thereof are like any other property of a decedent, and pass as any other assets of his estate, and are therefore rightly subject to state inheritance tax. However, the proceeds of war risk insurance are a definite kind of property, differing from the ordinary property of a soldier's estate, and are in the nature of a beneficence or gratuity, bounty or pension, affecting the rights of the soldier and his dependents, upon one side, and the government

of the United States, as a part of its war policy, upon the other side. This distinct class of property by federal enactment is not subject to the claims of creditors, or taxation, and is solely for the benefit of the soldier and his dependents and next of kin. Such assets pass under and by virtue of the federal act, and the decisions in the cases of *Plummer, Exr.,* v. *Coler, Compt., supra,* and *Murdock, Exr.,* v. *Ward, supra,* do not relate to property of that character.

To the same effect is *In re Estate of Harris, supra.*

We submit that these decisions stand for the principle that since the proceeds of War Risk Insurance policies did not pass to the beneficiaries by will or by intestacy, but passed under the contract and the Federal statutes, there was no transfer within the provisions of the inheritance or succession tax statutes there involved; and hence the taxes imposed violated the exemption provisions of the Federal statutes. In other words, there was not a transfer within the meaning of the State laws. It seems clear that the proceeds of ordinary commercial insurance policies payable to specific beneficiaries would also have been excluded from the measure of the transfer taxes imposed by those States, upon the ground that the proceeds did not pass under State laws of descent and distribution.

The tax laws of Ohio, West Virginia, Minnesota, Pennsylvania, Louisiana, and Washington then in

effect did not provide that the proceeds of insurance policies payable to specific beneficiaries should be included in the gross estate. The Washington statute imposed a tax on property passing by will or by the statutes of inheritance, and on certain other transfers that are not material here. Session Laws of Washington, 1917, c. 146, Sec. 1, p. 593. The statutes of the other States were substantially similar. See West Virginia Acts, 1909, c. 63, Sec. 1, p. 511; General Laws of Minnesota, 1905, c. 288, Sec. 1, p. 427, as amended by General Laws of Minnesota, 1911, c. 372, Sec. 1, p. 516; Pennsylvania Laws, 1917, Act No. 318, Sec. 1, p. 832; Ohio General Code, 1910, Vol. 2, Part II, Sec. 5331, as amended by the Act of May 8, 1913, Laws of Ohio, 1913, Vol. 103, Sec. 1, p. 463. The Louisiana statute imposed a tax on all legacies, inheritances, and gifts, *mortis causa.* Acts of Louisiana, 1906, No. 109, p. 173; Acts of Louisiana, 1918, No. 51, p. 75. And the courts of most States have held, in the absence of a specific provision, that the proceeds of policies payable to specific beneficiaries are not subject to the State inheritance taxes. *Vogel's Estate,* 1 Pa. C. C. R. 352; *In re Killien's Estate,* 178 Wash. 335; 32 A. L. R. 353; 47 A. L. R. 522.

It was owing to the fact that the provisions of the Federal statutes relating to War Risk Insurance made the distribution of proceeds after the death of the named beneficiary depend upon local law that the question of the inclusion of the proceeds of such insurance policies in the measure of

the tax arose in the cases cited by petitioner. Hence we submit that the State court decisions upon which it relies are in no way controlling here. It is significant that the New York death transfer tax which is closely analogous to the Federal estate tax has been held applicable to the proceeds of War Risk Insurance policies. *Estate of Gerald Sabin,* 224 App. Div. (N. Y.) 702 reversing 131 Misc. (N. Y.) 451; *Matter of Schaeffer,* 130 Misc. (N. Y.) 436; *Matter of Dean,* 131 Misc. (N. Y.) 125.

4. The petitioner also argues that Congress did not intend that the proceeds of War Risk Insurance policies should be included in the gross estate, since such inclusion must result in the diminution of the proceeds in the hands of the beneficiary. It refers to Sections 314 (b) and 315 (a) and (b) of the Revenue Act of 1926, as amended (Appendix *infra,* pp. 32–33).

Section 315 (a) makes the estate tax a lien for ten years upon the gross estate of the decedent. Section 315 (b) provides that if insurance passes under a contract executed by the decedent in favor of a specific beneficiary, and if the tax in respect thereto is not paid when due, then the beneficiary shall be personally liable for such tax, and, to the extent of the beneficiary's interest under such contract of insurance, the proceeds shall be subject to a lien equal to the amount of such tax. Section 314 (b) enables executors, after payment of estate

taxes, to secure reimbursement from the beneficiary of an insurance policy of such portion of the total tax paid as the proceeds in excess of $40,000 of such policies bear to the net estate. It provides further that where there are a number of beneficiaries the tax shall be collected from them in the same ratio.

It is clear that the statutes in question do not provide that any part of the estate tax is to be paid in the first instance by the beneficiaries of insurance policies. The statute contemplates that the estate tax shall be paid by the executor before the estate is distributed (Sec. 314 (b)), and he may pay it out of any assets in his hands, regardless of the nature of the property included in the gross estate. The estate tax is not an aggregation of separate taxes but a single tax based upon percentages of the net taxable value of the whole estate. *Guettel* v. *United States*, 95 F. (2d) 229, 230 (C. C. A. 8th), certiorari denied October 10, 1938, No. 47, present Term. It is only in the event that the executor does not pay, or the tax is not otherwise paid, that a lien would be enforced against the proceeds of insurance policies. If the executor does pay, he merely has a right to reimbursement against the beneficiaries which he may or may not enforce. The Commissioner is not required to apportion the tax or to enforce any right to reimbursement or contribution. Article 87 of Regulations 80 (1934 Ed.). And it cannot be assumed in this case that

the beneficiary will be required to pay part of the tax.

But in any event the provision for reimbursement does not alter the character of the tax. The tax is imposed on the transfer and not on the proceeds, whether or not the executor is reimbursed. Even if part of the tax should actually be paid out of the proceeds of the War Risk Insurance, this fact would not serve to show that the tax was imposed upon the proceeds rather than upon the transfer. See *Plummer* v. *Coler, supra,* p. 138; *United States* v. *Perkins,* 163 U. S. 625, 629–630; *Scholey* v. *Rew,* 23 Wall. 331.

There is no basis for the assumption that Congress did not intend that the proceeds of War Risk Insurance policies should be included in the gross estate because of those provisions for reimbursement. It merely expressed its purpose to exempt the proceeds from a direct tax. In so far as other taxes were concerned, particularly the estate tax, it may well have felt that any burden that chanced to fall upon the beneficiary was too negligible to consider, in view of the exemptions granted in the estate tax law itself. Nor do we think that the situation is altered by the fact that Section 22 of of the World War Veterans Act, *infra,* and Section 3 of the Act of August 12, 1935, *infra,* exempt the insurance from the claims of creditors. But even if it should be held otherwise, and if the reimbursement and lien provisions of Sections 314 and 315 should be held inapplicable to War Risk Insur-

ance in view of the statutes dealing with War Risk Insurance, that would not affect the validity of Section 302 (g) or prevent the collection of the tax from the estate. The Revenue Act contains the usual separability provision. See Section 1213, Revenue Act of 1926 (U. S. C., Title 26, Sec. 1699).

The petitioner refers to the fact that hearings on the Bill which subsequently became the Revenue Act of 1918 had begun when the War Risk Insurance Amendments Act of June 25, 1918 (Appendix, *infra*, p. 34), was passed and that the Revenue Act of 1918 was the first statute to contain a provision for taxing insurance payable to specific beneficiaries. Section 402 (f). But the Revenue Act of 1918 exempted insurance not in excess of $40,000 and taxed only estates in excess of $50,000, so that there was no possibility that a veteran dying possessed of only a moderate estate would be liable for any estate tax. If we are to speculate as to what Congress intended by considering that Section 402 (f) was before it at the time that the War Risk Insurance Act was first amended by the Act of June 25, 1918, to include a tax exemption provision, we may well assume that Congress thought that the exemption provisions of the Revenue Act itself afforded sufficient protection to the veteran from the estate tax.

5. The petitioner also argues that in providing that insurance should be exempt from taxation Congress must have had in mind estate taxes

because no other taxes would apply to insurance. We submit that Congress may have had in mind the imposition of property taxes on the insurance. In that connection attention is called to the fact that Section 402 of the War Risk Insurance Act provided insurance against total permanent disability, as well as against death, and that, in the event of the insured's becoming totally and permanently disabled, he himself would receive the insurance.

The legislative history itself throws little light on the intention of Congress. As previously pointed out, the exemption provision first appeared in Section 2 of the Act of June 25, 1918 (Appendix, *infra*, p. 34). The House Report does not discuss this feature of that Act. The Report of the Senate Committee on Finance (S. Rep. No. 428, 65th Cong., 2d Sess.) appends the testimony of Assistant Secretary of the Treasury Love before the Committee, who explained that provision as follows (p. 22):

> Another provision makes a uniform rule applicable to the whole act providing that allotments and allowances, compensation and insurance are not assignable, not subject to claims of creditors, and that they are exempt from taxation. A similar provision is found in section 311 relating to compensation, and in section 301 relating to insurance. By an apparent oversight, however, it was not included in article 2, relating to allotments and family allowances. With a

general provision here inserted, section 311 is repealed as well; also the Senate's in 402, along same line.

We think it plain, therefore, that neither the World War Veterans' Act, 1924, *infra,* nor the Act of August 12, 1935, *infra,* if that statute is applicable, prohibits the imposition of the estate tax here involved. Exemptions from taxation are strictly construed. *Hale* v. *State Board,* 302 U. S. 95; *Pacific Co.* v. *Johnson,* 285 U. S. 480; *Bank of Commerce* v. *Tennessee,* 161 U. S. 134; *Millsaps College* v. *Jackson,* 275 U. S. 129; *Phipps* v. *Commissioner, supra.* An asserted exemption will be denied unless it is granted by the statute in plain terms. *United States Trust Co. of New York* v. *Anderson,* 65 F. (2d) 575 (C. C. A. 2d), certiorari denied, 290 U. S. 683; *Phipps* v. *Commissioner, supra.*

In *Trotter* v. *Tennessee,* 290 U. S. 354, this Court had under consideration the question whether the exemption from taxation provided by Section 22 of the World War Veterans' Act, 1924, *infra,* extended to lands purchased by the guardian of veterans with money received from the United States as compensation and disability benefits under Titles II and III of that Act. The Court held that the land was not exempt from State and county taxes, and in that connection said (pp. 356–357):

> *Exemptions from taxation are not to be enlarged by implication if doubts are nicely balanced. Chicago Theological Seminary*

v. *Illinois,* 188 U. S. 662, 674. On the other hand, they are not to be read so grudgingly as to thwart the purpose of the lawmakers. The moneys payable to this soldier were unquestionably exempt till they came into his hands or the hands of his guardian. *McIntosh* v. *Aubrey,* 185 U. S. 122. We leave the question open whether the exemption remained in force while they continued in those hands or on deposit in a bank. Cf. *McIntosh* v. *Aubrey, supra; State* v. *Shawnee County Comm'rs,* 132 Kan. 233; 294 Pac. 915; *Wilson* v. *Sawyer,* 177 Ark. 492; 6 S. W. (2d) 825; and *Surace* v. *Danna,* 248 N. Y. 18, 24, 25; 161 N. E. 315. Be that as it may, we think it very clear that there was an end to the exemption when they lost the quality of moneys and were converted into land and buildings. The statute speaks of "compensation, insurance, and maintenance and support allowance payable" to the veteran, and declares that these shall be exempt. We see no token of a purpose to extend a like immunity to permanent investments or the fruits of business enterprises. Veterans who choose to trade in land or in merchandise, in bonds or in shares of stock, must pay their tribute to the state. *If immunity is to be theirs, the statute conceding it must speak in clearer terms than the one before us here.* [Italics supplied.]

6. Finally, this case does not present any constitutional question. The question is what taxes did the contract prohibit, and not whether the

United States may repudiate any obligation under the contract.

The United States does not wish to repudiate its contract with the insured and no such question is presented. We do not contend that the Revenue Act defeats an exemption given to veterans. The question is whether the statute, which forms a part of the contract (*White* v. *United States,* 270 U. S. 175), should be construed as prohibiting the imposition of a Federal estate tax on the transfer of the net estate of a decedent which consists in part of the proceeds of a War Risk Insurance policy. If the statute does not prohibit the tax, there is no violation of any contract and no constitutional reason why the tax may not be imposed. See *Murdock* v. *Ward,* 178 U. S. 139, 148.

CONCLUSION

The decision of the court below should be affirmed.

Respectfully submitted.

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January 1939.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 302 [As amended by Sec. 404 of the Revenue Act of 1934].[1] The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside the United States.

* * * * *

(g) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life.

* * * * *

[U. S. C., Title 26, Sec. 411.]

SEC. 314. (b) If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the

[1] The amendment changed only the portion of Section 302 preceding the subdivisions and related to the exclusion of real property situated outside the United States.

distribution of the estate or hose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this title that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution. If any part of the gross estate consists of proceeds of policies of insurance upon the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds, in excess of $40,000, of such policies bear to the net estate. If there is more than one such beneficiary the executor shall be entitled to recover from such beneficiaries in the same ratio [U. S. C., Title 26, Sec. 426].

SEC. 315 (a) [As amended by Section 613 (b) of the Revenue Act of 1928 and by Section 809 of the Revenue Act of 1932]. Unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien. If the Commissioner is satisfied that the tax liability of an estate has been fully discharged or provided for, he may, under regulations prescribed by him with the approval of the Secretary, issue his certificate releasing any or all property of such estate from the lien herein imposed.

(b) [As amended by Section 803 (c) of the Revenue Act of 1932]. If (1) except in the case of a bona fide sale for an adequate and full consideration in money or money's worth, the decedent makes a transfer, by trust

or otherwise, of any property in contemplation of or intended to take effect in possession or enjoyment at or after his death, or makes a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (A) the possession or enjoyment of, or the right to the income from, the property, or (B) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom, or (2) if insurance passes under a contract executed by the decedent in favor of a specific beneficiary, and if in either case the tax in respect thereto is not paid when due, then the transferee, trustee, or beneficiary shall be personally liable for such tax, and such property, to the extent of the decedent's interest therein at the time of such transfer, or to the extent of such beneficiary's interest under such contract of insurance, shall be subject to a like lien equal to the amount of such tax. Any part of such property sold by such transferee or trustee to a bona fide purchaser for an adequate and full consideration in money or money's worth shall be divested of the lien and a like lien shall then attach to all the property of such transferee or trustee, except any part sold to a bona fide purchaser for an adequate and full consideration in money or money's worth [U. S. C., Title 26, Sec. 427].

Act of June 25, 1918, c. 104, 40 Stat. 609:

SEC. 2. That four new sections are hereby added to Article I of said Act,[2] to be known

[2] Act to authorize the establishment of a Bureau of War Risk Insurance in the Treasury Department, approved September 2, 1914, as amended.

as sections twenty-seven, twenty-eight, twenty-nine, and thirty, respectively, and to read as follows:

* * * * *

SEC. 28. That the allotments and family allowances, compensation, and insurance payable under Articles II, III, and IV, respectively, shall not be assignable; shall not be subject to the claims of creditors of any person to whom an award is made under Articles II, III, or IV; and shall be exempt from all taxation: *Provided,* That such allotments and family allowances, compensation, and insurance shall be subject to any claims which the United States may have, under Articles II, III, and IV, against the person on whose account the allotments and family allowances, compensation, or insurance is payable.

* * * * *

World War Veterans' Act of June 7, 1924, c. 320, 43 Stat. 607, 613:

SEC. 22. That the compensation, insurance, and maintenance and support allowance payable under Titles II, III, and IV, respectively, shall not be assignable; shall not be subject to the claims of creditors of any person to whom an award is made under Titles II, III, or IV; and shall be exempt from all taxation: *Provided,* That such compensation, insurance, and maintenance and support allowance shall be subject to any claims which the United States may have, under Titles II, III, IV, and V, against the person on whose account the compensation, insurance, or maintenance and support allowance is payable.

That the provisions of this section shall not be construed to prohibit the assignment

by any person to whom converted insurance shall be payable under Title III of such Act of his interest in such insurance to any other member of the permitted class of beneficiaries [U. S. C., Title 38, Sec. 454].

Act of August 12, 1935, c. 510, 49 Stat. 607, 609, amending World War Veterans' Act of June 7, 1924:

SEC. 3. Payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of, a beneficiary under any of the laws relating to veterans shall be exempt from taxation, shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. Such provisions shall not attach to claims of the United States arising under such laws nor shall the exemption herein contained as to taxation extend to any property purchased in part or wholly out of such payments. Section 4747 of the Revised Statutes and Section 22 of the World War Veterans' Act, 1924, are hereby repealed, and all other Acts inconsistent herewith are hereby modified accordingly. The provisions of this section shall not be construed to prohibit the assignment by any person, to whom converted insurance shall be payable under title III of the World War Veterans' Act, 1924, of his interest in such insurance to any other member of the permitted class of beneficiaries [U. S. C., Supp. III, Title 38, Sec. 454].

SEC. 5. That this Act shall take effect and be in force from and after its passage, but the provisions hereof shall apply to payments made heretofore under any of the

Acts mentioned herein [U. S. C., Supp. III, Title 38, Sec. 454].

Treasury Regulations 70 (1926 Ed.), promulgated under the Revenue Act of 1926:

ART. 25. *Taxable insurance.*—The statute provides for the inclusion in the gross estate of insurance taken out by the decedent upon his own life, as follows: (*a*) All insurance receivable by, or for the benefit of, the estate; (*b*) all other insurance to the extent that it exceeds in the aggregate $40,000.

The term "insurance" refers to life insurance of every description, including death benefits paid by fraternal beneficial societies, operating under the lodge system. Insurance is deemed to be taken out by the decedent in all cases where he pays all the premiums, either directly or indirectly, whether or not he makes the application. On the other hand, the insurance is not deemed to be taken out by the decedent, even though the application is made by him where all the premiums are actually paid by the beneficiary. Where a portion of the premiums were paid by the beneficiary and the remaining portion by the decedent the insurance will be deemed to have been taken out by the latter in the proportion that the premiums paid by him bear to the total of premiums paid.

* * * * *

ART. 27. *Insurance receivable by other beneficiaries.*—All insurance in excess of $40,000 receivable by beneficiaries other than the estate must be included in the gross estate of any decedent dying after the effective date of the Revenue Act of 1918, except that where the decedent died subsequent to the effective date of the Revenue

Act of 1918, but prior to the effective date of the Revenue Act of 1924, the proceeds of insurance policies taken out by him upon his own life payable to beneficiaries other than to or for the benefit of the decedent's estate, are not includable in the gross estate if the beneficiary receiving the proceeds became such prior to the effective date of the Revenue Act of 1918 and thereby acquired, prior to the effective date of the Revenue Act of 1918, a vested interest in the proceeds of the policy under the State law governing the rights or interest ~~of the~~ beneficiary.

Insurance payable to beneficiaries other than the estate, or for the benefit of the estate, need not be included in the gross estate of a decedent who died before the effective date of Title IV of the Revenue Act of 1918, but where, subsequent to September 8, 1916, such a decedent assigned a policy of insurance payable to or for the benefit of his estate, or caused it to be made payable to a specific beneficiary in contemplation of or intended to take effect in possession or enjoyment at or after his death, the entire proceeds should be included if such assignment or change in beneficiary did not amount to a bona fide sale for a fair consideration in money or money's worth. (See Articles 15 to 21, inclusive.)

The estate is entitled to only one exemption of $40,000 upon insurance receivable by beneficiaries other than the estate. For example, if the decedent left life insurance payable to three such beneficiaries in amounts of $10,000, $40,000, and $50,000 (total, $100,000), the full amount should be listed on the return and therefrom subtracted the $40,000 exemption as provided in Schedule C of Form 706. The word "beneficiaries," as used in reference to the

> $40,000 exemption, means persons entitled to the actual enjoyment of the insurance money.

Treasury Regulations 80 (1934 Ed.), promulgated under the Revenue Act of 1926, as amended by the Revenue Acts of 1928, 1932, and 1934:[3]

> ART. 25. *Taxable insurance.*—The statute provides for the inclusion in the gross estate of insurance taken out by the decedent upon his own life, as follows: (*a*) All insurance receivable by, or for the benefit of, the estate; (*b*) all other insurance to the extent that it exceeds in the aggregate $40,000.
>
> The term "insurance" refers to life insurance of every description, including death benefits paid by fraternal beneficial societies operating under the lodge system. Insurance is considered to be taken out by the decedent in all cases, whether or not he makes the application, if he pays the premiums either directly or indirectly, or they are paid by a person other than the beneficiary, or decedent possesses any of the legal incidents of ownership in the policy. Legal incidents of ownership in the policy include, for example: The right of the insured or his estate to its economic benefits, the power to change the beneficiary, to surrender or cancel the policy, to assign it, to revoke an assignment, to pledge it for a loan, or to obtain from the insurer a loan against the surrender value of the policy, etc. The decedent possesses a legal incident of ownership if the rights of the beneficiaries to receive the pro-

[3] This article was amended by T. D. 4729, 1937-1 Cumulative Bulletin 284, 288, but not in any way that is material here.

ceeds are conditioned upon the beneficiaries surviving the decedent.

* * * * *

ART. 27. *Insurance receivable by other beneficiaries.*—The statute requires the inclusion in the gross estate of the decedent of the proceeds of any policy, or the aggregate proceeds of all policies, not receivable by or for the benefit of decedent's estate, to the extent that such proceeds exceed $40,000, regardless of when the policy was or the policies were issued, if the decedent possessed at the time of his death any of the legal incidents of ownership.

The estate is entitled to only one exemption of $40,000 upon insurance receivable by beneficiaries other than the estate. For example, if the decedent left life insurance payable to three such beneficiaries in amounts of $10,000, $40,000, and $50,000 (total, $100,000), the full amount should be listed on the return and therefrom subtracted the $40,000 exemption as provided in Schedule C of Form 706. The word "beneficiaries," as used in reference to the $40,000 exemption, means persons entitled to the actual enjoyment of the insurance money.

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